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In the

Supreme Court of the United States

OCTOBER TERM, 1973

Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife,

Petitioners,

vs.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Washington

BRIEF OF LAW SCHOOL ADMISSION COUNCIL AMICUS CURIAE

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OCTOBER TERM, 1973

No. 72-235

Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife,

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vs.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington,

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AMICUS CURIAE

INTEREST OF THE AMICUS

The Law School Admission Council submits its brief as *amicus curiae*, with consent of the parties, to support

affirmance of the judgment below, reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

The Council's limited purpose is to aid the Court in understanding the complex process of selecting among applicants to law schools, and in avoiding a decision based upon misconception or unfounded assumption. More particularly, the Council's purpose is to assist the Court in steering between the Scylla and Charybdis of the polar positions presented in other briefs: at one extreme, compelling selection solely upon the basis of numerical predictors to the exclusion of other relevant qualifications which numbers do not purport to measure; or at the opposite extreme, forbidding use of those numerical predictors at all because they touch only a part of the appropriate qualifications and do not measure everything. Rejecting both, the nation's law schools should not be foreclosed from giving due consideration to any and all factors relevant to the purposes for which law schools are established and maintained, and should be permitted to weigh in the balance both numerical predictors and other, non-numerical factors, equally relevant, including factors which for the present [sic] time are inextricably associated with race or ethnic background.

The Law School Admission Council is an organization of 148 American law schools, representing nearly all institutions accredited by the American Bar Association. For twenty-five years it has served as the principal organ of cooperation and communication on matters of admission in American legal education. Through the Council, law schools jointly have arranged for services, for which the Educational Testing Service is the principal contractor, widely used in the admissions process. The two major services involved in this case are the Law School

Admission Test, a three-hour written test measuring certain mental capabilities related to academic performance in law school, and the Law School Data Assembly Service, which collects the applicants' college transcripts, converts the grades to a common scale, and computes and reports an undergraduate grade average in comparable figures.

While the Council does not undertake to tell member schools how to select among applicants, it does draw upon its extensive statistical research into all aspects of the process, and upon years of shared experience, to provide recommendations and advice upon the value and limitations of the data generated by these services. Specifically, the Council has consistently warned against overemphasis, typified by petitioner's argument here, upon the numerical predictors supplied by these services: the LSAT score and the college grade average. Although the Council will combine these numbers into a predicted first-year law school average grade (PFYA), at the request of a law school and on the basis of a statistical analysis of its experience, it is directly contrary to the Council's teachings to permit this convenient and useful servant to become the master, controlling the selection process to the exclusion of other important factors which cannot readily be reduced to numbers or fed into a mechanical formula.

The tendency of numerical predictors to discourage or to exclude applicants with atypical backgrounds led the Council in 1963 to embark upon a program to facilitate access to law school, and to the legal profession, for members of minority groups. In furtherance of the goal, the Council has sponsored a series of recruiting conferences and tours, offered the LSAT free at a number of pre-

dominantly Black southern colleges and authorized fee waivers for other economically deprived applicants, served as a founding sponsor of the Council on Legal Education Opportunity, conducted a series of research studies into the possibility of bias in the numerical predictors and into their differential validity, and produced a variety of publications, including newsletters, surveys, reports, and a compilation about special programs titled *"Graduate and Professional School Opportunities for Minority Students"* (ETS, 5th ed. 1973-74). The nation's law schools have individually adopted policies aimed at the same goal of increasing minority enrollment. This published compilation of opportunities for minority students contains announcements of special minority group programs, in the areas of recruitment, admission, financial aid, and tutorial assistance, at more than ninety percent of the hundred-odd law schools listed.

The Council's participation in this case is not attributable to any general policy of the organization to come to the aid of its members. On the contrary, pursuant to its policy of equal opportunity, the Council would as readily support a rejected applicant in proceedings against a member school which had misused the Council's test or services as an instrument of invidious discrimination. Its interest here is engendered by the threatened misuse of these services as urged by the petitioner and supporting amici, and by the danger that such misuse would compel segregated legal education, if not legal education "for whites only." The general policies and procedures followed by the University of Washington are not only typical of those prevailing throughout American legal education; those policies and procedures are also in full accord with the Council's advice and objectives.

Confident in the belief that the legal precedents and authorities will be fully presented by other friends of the Court, this Amicus will confine its presentation to an analysis of the process of selection for admission to law schools, and to the policies and principles reflected in that process, speaking from the Council's accumulated experience and research.

SUMMARY OF ARGUMENT

In allocating a limited number of openings among a surplus of fully qualified applicants, a law school's objective is to select those best qualified to meet the varied needs of the profession, not simply those who show a probability of slightly higher first-year law school grades. Against this broader criterion, there is no basis for petitioner's assertion that he was "better qualified", or that a "preference" was given when applicants were admitted with lower test scores or college grades. The University's announced policy to seek increased enrollment from minority groups merely emphasized the broadened criterion, looking beyond narrow numerical predictors to qualities bearing on the applicant's potential for contribution as a lawyer. In this balance, a number of non-numerical factors are relevant, including the experiential, cultural, and educational background inextricably associated with minority status. Consideration of that status, as one factor among many, is essential to a rational evaluation of the applicant's probabilities of academic success, and, more importantly, of his potential for contribution to the education of his law school classmates and to society at large through his work as a lawyer. To exclude solely on the basis of test scores and college grades, with no evaluation of the applicant's broader capacities for performance in the legal

profession, would raise even more serious questions of Equal Protection.

Viewed in the perspectives of statistical probabilities, and in combination with other predictive factors not reduced to numbers or included in the formula for the predicted first year average, petitioner's test scores and college grades do not establish that he was "better qualified" than admitted applicants with slightly lower numerical ratings. Thus even if Equal Protection forbade consideration of anything but probable relative rankings on first-year law school grades, as petitioner urges, the evidence and findings below fail to raise any significant probability sufficient to compel the conclusion that his grades would be markedly better, or that his rejection was the product of anything other than a fair, even-handed, and reasoned evaluation of his probabilities in comparison with others.

ARGUMENT

Introductory.

Petitioner and his amici invite the Court to render a sweeping decision, embracing not only admission to law school but as well to every other branch of education where admission must be obtained, and to rule upon the validity of affirmative action programs, beyond education, in all areas of employment.

No foundation for such a decision is presented. The petition for a writ of certiorari was granted upon the question, as stated in the Petition, page 6, whether a state law school may give "preference solely on the basis of race to certain persons to the exclusion of others in competition for limited spaces available in the law school." Examination of the record now on file reveals that no such question is presented upon the facts established below. In light of the limited predictive value of the Predicted First Year Average, and the narrow range of difference between petitioner's PFYA and the lower predictions for other applicants, both black and white, who were admitted, no "preference" has been established by the evidence, even if prediction of law school success had been the sole basis of selection by the law school, or if such selection were constitutionally compelled. Thus there is no factual foundation for the tendered question.

Even if petitioner had established that he was "better qualified" than accepted minority applicants in terms of a probability of obtaining a higher first-year law school grade average, no preference would be established in

terms of the actual criteria used by the law school to select among well qualified applicants: ability to make significant contributions to law school classes and to the community at large. No evidence was offered, no finding was made, and no claim has been advanced, that petitioner was "better qualified" by this standard. Moreover, the record fails to reveal any causal relationship between any supposed preference and petitioner's failure to qualify, since there were more than enough non-minority applicants ranked ahead of him to fill the class if no minority applicants had been accepted. Since the question tendered by the petitioner is not presented in the record, it is respectfully suggested that the writ was improvidently granted.

I. QUALIFICATION FOR LAW STUDY AND THE LEGAL PROFESSION IS NOT DETERMINED SOLELY BY PREDICTIONS OF FIRST YEAR LAW SCHOOL GRADES, TO THE EXCLUSION OF OTHER RELEVANT FACTORS, INCLUDING MINORITY STATUS.

This case would not have arisen ten years ago. It is a product of the times, of population growth, increased college attendance, and the enhanced popularity of law as a career. From 1967 to 1971, the number of applicants to the University of Washington Law School rose from 618 to 1601, in parallel with the national trend evidenced by the increase in the number of persons taking the LSAT from 47,458 to 107,147 in those years. The change in volume confronted the law schools with questions different in kind, not merely in degree. When acceptances could be offered to roughly half the applicants (with some 300 invitations necessary to fill 150 seats, and 600 applications), the admissions function was essentially negative, simply a matter of denying applications from those who had no reasonable prospect of completing

the course of study in law school, and leaving the remainder, who were qualified in this sense, to be accepted. With the increase, it became necessary, for Washington and other law schools, to deny four times as many applicants, most of whom were fully qualified in the sense of minimal competence, would have been welcomed to law school classes of previous years, and presented credentials better than their predecessor applicants of a few years before who had become successful practitioners and leaders of the bar. What had been a process of exclusion of the unqualified was thus transformed into a process of selection from among the well qualified. The purpose was no longer to assure minimal competence, as by a bar examination, but to make a rational allocation of scarce resources, as in the award of television licenses* or the choice of law clerks for the Justices of the Court. The change in the question worked a change in the data relevant to the answer; the prediction of law school academic success diminished in significance in choosing among clearly qualified applicants so similar on this measure that no meaningful distinctions could be drawn. Now the scales are tipped by other factors in the balance, factors which cut directly to the root purpose of the selection process and flow from the ultimate goals of legal education.

a. The Objective of Selection Is to Meet the Public Need for Lawyers.

The underlying objective of legal education, and the justification for public support and maintenance of law schools, is to serve the public interest by providing lawyers

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* See *TV 9, Inc.* v. *Federal Communications Comm'n*, ...F.2d..... (U.S. Ct. App. D.C. Cir., No. 72-2049, Nov. 6, 1973) (directing that consideration be given to minority status of license applicant).

who will contribute in the manifold work of the legal profession in all its branches, and who will fill the varied jobs where law is made and enforced. This public purpose defines the shape of the criterion for selecting law students. The University of Washington announced this target in plain phrases: the "ability to make significant contributions . . . to the community at large" above and beyond "potential for outstanding performance in law school" and the capacity to make "contributions to law school classes." App. 34-35.

To do his job, the lawyer must have certain intellectual equipment, including a working knowledge of basic legal principles, analytical abilities, and verbal fluency. Hence the requirement of a law degree for admission to the bar, and of probable law school success for admission to law school. But there are other qualities of the lawyer, equally important to his function, which law schools do not teach, law school examinations do not test, and law school grades do not measure.

Law school grades signify little or nothing about whether the graduate has the special qualities of the trial lawyer, whether he can be entrusted with responsibility for the vital interests of others, whether he has a judicious temperament, whether he can bring empathy and understanding to the plight of a client, or whether he is dedicated to public service. The lawyer's work is varied, and different kinds of people with different qualities and motivations are needed for different jobs: for general practice in the small town, for metropolitan firms, for elective office and government posts, for the bench, for the corporate legal staff,—in sum, to provide needed legal services for all sectors of society. Choosing the prospective lawyer is thus a complex process, far re-

moved from the selection of a typist or assembly line worker. It is, inherently, a matter of prediction and probability, weighing a number of factors in complex combination.

No doubt some law school committees would be relieved to deliver their thousands of application files to a court upon a bill of interpleader, with the applicants directed to interplead their conflicting claims for acceptance. The root issues, however, are educational, not legal.

Conceivably the process could be fully quantified, with every factor assigned a numerical value and the decision remitted to a computer. Points could be given to approximate the appropriate weight and probability for each factor and quality, with the minimum point total for admission determined by the competition. Some applicants would exceed the minimum with little but superior intellectual ability, since brilliance is useful in law school classes. Others would counterbalance a lesser academic promise with added points for their ability to bring different perspectives to classroom analysis of legal issues, with viewpoints derived from cultural backgrounds not otherwise represented in the mix. Still others would gain points for their potential to make significant contributions after graduation, because of their motivations, career plans, or personal qualities. If such a mechanical system could be devised, however, the blunt, mindless formula would produce nothing more than a rough approximation of what is already being done, and would sacrifice the sensitive gradations and subtle perceptions now contributed to the evaluative process by the collective judgment of law teachers and administrators. But equal protection does not command equal numbers, and mathematics holds no monopoly of reason and fairness. Like

the delicate weighing of competing interests required for judicial decision in a complex case, the selection process is neither arbitrary nor capricious because some of its vital components are not reduced to numbers but are left to human judgment.

b. All Factors Relevant to the Applicant's Potential for Contribution as a Lawyer Should be Weighed in the Balance.

The essential command of Equal Protection, like the ultimate objective of law school selection, is that all evidence relevant to the purpose at hand must be accorded its due weight, and no more. For example, it would be unreasonable, arbitrary, and perhaps unlawful for a law school to look only to the Law School Admission Test in the selection process, and to refuse to consider other factors which bear upon an applicant's potential for academic performance in law study, for enriching the education of his classmates, or for useful service as a lawyer. This is the basic teaching of *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971): that a standardized test may not be used as the sole ground for excluding those who might prove fully qualified for the job if other evidence were considered. On the other hand, it would be equally unreasonable and unwise to refuse to consider available LSAT scores, since they have been proved to be valid and reliable measures of a significant ability requisite to law study. The same perspective and balance is required in the use of other factors relevant to the goal served by the selection process: college grades, college professors' recommendations, work experience, military service, extracurricular activities and accomplishments, and biographical data such as age, sex, residence, marital state, and minority status. All are related

to the objective of providing able lawyers for the work that needs doing, but grave questions of Equal Protection would be raised by the unreasoning use of any one factor as the sole determinant and absolute prerequisite. Of course, in cases where all other things are equal between two applicants for the last seat, the differentiating factor alone is left to tip the scales. Thus minor differences in numerical predictors may be dispositive between applicants with identical backgrounds, while a major difference in background factors may counterbalance an otherwise significant numerical disparity. But this use of a factor, appropriately weighed in a rational balance, does not involve forbidden discrimination on the ground of that factor, whether it be the score on a standardized test or age, sex, residence, or cultural, ethnic or racial background. On the contrary, to refuse to give the factor its appropriate due, and to base decisions solely on the incomplete evidence which remains, would be discriminatory and unreasonable.

This balanced evaluation involves no "quota", benign or invidious, in the sense of an *a priori* number or ratio. There is no seat for which any applicant is ineligible by reason of race, and all are equally evaluated by the same committee against the same ultimate public purpose and objective.

c. Minority Status is a Factor Relevant to an Applicant's Potential for Contribution.

The corollary principle, forbidding the use of factors which bear no reasonable relation to the legitimate objectives of selection, is governed in its application by the scope of the objectives. Minority status is not unrelated or extraneous to the goals of legal education, so that its limited use in selection could fairly be called a "pref-

erence." The relevant fact is not race in any genetic or biological sense, but rather the cultural background which, in this era and in this nation, is inextricably interrelated with perceived membership in such a minority group. Within this generation, race has been the explicit basis of segregation and discrimination commanded, sanctioned, or tolerated by state and local law, in the realms of public education, housing, and employment. The handicaps thus visited on members of minority groups bear directly on the appraisal of their pre-law educational attainments. The mere earning of a college degree in such a climate demonstrates drives, motivations, and aspirations relevant to performance in the law which college graduation does not import for a middle class white. A proven capacity to catch up in learning, and the distance between where he started and where he now stands, may be more important to prediction than a comparison of his present level of attainment with that of others who had no headwinds to overcome. Standardized testing is not so familiar in segregated or vocational schools, where college preparation is not emphasized, and the verbal abilities measured by such tests—and by law school examinations—are seldom developed in such an environment. From a background with a different culture and values, the minority law student can contribute to the education of his classmates in the workings of law and government in a pluralistic, multi-racial, and vari-cultured society. And his contributions as a lawyer, judge, or public official may be enhanced and enriched by his background. In sum, minority status bears a direct and legitimate relevance to every objective of the selection process, and no rational process of evaluation can be color blind.

The purpose is not to provide proportional representation for every sub-group of society, to make each law school class a perfect microcosm of the nation at large. It is rather to supply lawyers best qualified for the many tasks of the legal profession.

As with other factors, the relevance of minority status rests upon inference and probability founded in experience. The use of minority status as evidence of probable educational handicaps, varied experience, or cultural values is no less reasonable than the use of military service as evidence of probable discipline and maturity, or the use of good grades in Latin as evidence of probable good grades in law school. Within the limits of time, effort, and resources available for the selection process, a detailed inquiry cannot be conducted to verify, as to every individual, every inference drawn from reason and experience. Morover, even with infinite resources, there are no sure means to measure the truly relevant fact, not the nature of the individual's experience, but its impact on his mind and on his probable future behavior. Finally, the effort to ascertain the precise degree of each minority applicant's deprivation would inevitably conflict with interests of privacy, with inquiries into father's occupation, mother's education, family income, and even more sensitive personal data.

Petitioner has built his claim of discrimination by narrowly redefining the objective of selection to embrace only probable first-year grades. The test is too narrow; many law schools have abandoned class rankings, especially in the first year, and a significant minority assign no first-year grades at all, but use a Pass-Fail system. When qualification is measured by the broader criterion of potential for the legal profession, the supposed preference evaporates.

II. EVEN IF PROBABLE RELATIVE LAW-SCHOOL GRADE RANKING WERE THE SOLE PERMISSIBLE CRITERION, THE PREDICTION BASED ON RAW TEST SCORES AND COLLEGE GRADES WOULD NOT ESTABLISH THAT PETITIONER IS BETTER QUALIFIED.

a. The Predicted First Year Average Reflects Only a Shifting Range of Probability.

The position of petitioner and supporting amici proceeds from the unstated premise that the PFYA (predicted first-year average) carries some intrinsic truth, and is an accurate measure of who is "better qualified" for law school and of who has "lower qualifications." Accepting for purposes of argument their corollary premises that probable law school success must be the dominant if not the exclusive basis of selection, the PFYA has inherent limitations which petitioner has chosen to ignore. It is, by definition, a *predicted* average grade in the first year of law school, a statement of the odds, not a measure of actual achievement. The petitioner's PFYA of 76.23 imports a beguiling certainty, and implies a significant margin of superiority over the 74.50 line of presumptive rejection. In actuality, however, the PFYA is only a convenient shorthand expression for the probability that the *average* of the *grade averages* of students admitted with a combination of test scores and college grades like petitioner's will be in that range, on the basis of the experience of earlier classes. The number, with its delusive precision, serves to conceal the *certainty* that many students with a PFYA of 76.23 will achieve first-year grades well below that mark, and that others will do much better than that prediction.

In conventional statistical terms, used in regression analysis, the validity of such a predictor is expressed

as the coefficient of correlation, a two-digit number in hundredths, with .99 as near-perfect prediction and .00 representing no predictive relationship at all. In hundreds of studies, the average coefficient for all law schools has been .42; in the study which generated Washington's PFYA, the coefficient was .39, for practical purposes no different from the national average. This coefficient means that the average student with a specific predictor will achieve law school grades four-tenths (rounding .39 and .42) as far above or below the average of the whole class as he ranked above or below the average on the predictor, with distance above or below the average measured in conventionalized units or "standard deviations." From the coefficient of correlation and standard deviation, a third figure is derived, the standard error of estimate, expressing the probable scatter of students with a given predictor above and below their predicted grades. For the University of Washington in the relevant year, these statistical analyses meant only that the probabilities were that one-third of the group, including petitioner, with PFYA's of 76 would achieve law school averages between 74 and 78, with the others falling evenly above or below. In comparison, a PFYA of 74, below the line of presumptive rejection, expressed the probability that half those students would do better, and half worse, than the prediction, with the same scatter. Thus the difference between petitioner's 76 and another applicant's 74 meant only that petitioner had two chances out of three of doing better than 74 in law school, while his competitor for the seat with a 74 PFYA had a fifty-fifty chance of exceeding that grade. But the *average* law school grade used in the prediction was 74.4 so the comparison discloses not relative chances of failure, but relative chances of ranking in the upper half of the class.

b. Differences in the PFYA's in Question are Minor.

Probability aside, the PFYA also diminishes in significance when viewed in the light of its sensitivity to minor changes in its component sources. An applicant who received the identical scores attained by petitioner on his first try at the LSAT, but who did not bother to retake the test, and who had an identical college record except that he took four different and harder courses than petitioner, earning B's where petitioner received A's, would have a PFYA of 74.46, so low that in the words of the trial judge, he would have been "summarily denied." App. 53. In other words, the differences in PFYA portrayed by the trial judge, petitioner, and his amici as a grand gulf of separation emerge, upon analysis, as fine lines indeed.

The same sort of examination should serve to dispel any misapprehension that the minority students accepted by the law school were not "qualified" for the study of law or to become lawyers. Each was a college graduate with at least a bachelor's degree. The average of the 41 minority applicants admitted as of August 1, 1971, had earned a combined grade average for his junior and senior years in college in excess of a B (3.04), and had an average score on the LSAT of 534 (compared with petitioner's original score of 512) and an average Writing Ability score of 52, both above national averages. With these credentials, the formula employed to produce the PFYA predicted that one-third of these minority students would rank in the top half of the law school class.

Statistical predictions perform a useful but limited service, in winnowing out those applicants who have no reasonable prospect of passing. Once that threshold is crossed, their utility is attenuated if not exhausted. One

view, widely if not generally held among experts in admissions processing,* holds that relative predictions should be wholly ignored in choosing among applicants who satisfy a minimum standard of probable success. Beyond that point, a lottery would be fair if not rational. If reason is used instead of chance, geographic diversity may provide the standard, as in the case of the United States military service academies. Foreign students may be sought, or applicants from a variety of colleges, or major disciplines, or pre-law experience, or cultural backgrounds. In any event, when it is probable that competing applicants will rank solidly in the middle of the class, a minor shift of probable rank in that range carries little meaning. For this very reason, many law schools refuse to provide a numerical ranking of their students.

Admission to law school is not a prize, like a Phi Bet Kappa key, awarded for excellence in undergraduate studies, nor a reward for a high LSAT score. College grades and test scores are relevant because—and to the extent that—they predict law school grades. In turn, law school grades are relevant because they help to predict success in the practice of law. Prediction of human behavior is an inexact science, and one can be grateful that it is, so that no one is predestined and incapable of surpassing his probabilities. Minor departures from the strictures of statistics in this field can be misconceived as preference for the "less well qualified" over the "better qualified" only by those who are innocent of the limits of prediction and who place too much trust in numbers.

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* *See, e.g.*, Thorndyke, *Concepts of Culture-fairness*, 8 Journal of Educational Measurement 63-70 (1971); Darlington, Another Look at "Culture-fairness," 8 Journal of Educational Measurement 71-82 (1971).

c. Raw Test Scores and College Grades Must be Corrected and Adjusted in Light of Non-Numerical Factors.

Raw college grades and test scores are not immutable, precise, and objective. Even if prediction of law school grades on these limited factors were the sole criterion, the numbers are subject to correction on the basis of other data. For example, the PFYA of most of the applicants to the law school was computed on the basis of grades for only part of the work of their senior college year at best, since unlike petitioner, they had not yet been graduated when their applications were submitted. Additional transcripts, showing subsequent work, were considered in the deliberative process without recomputing the PYFA. App. 23-24 Examination of the full transcript might call for other adjustments as well. Here the first two years of college for the petitioner had been less strong, and a preference might logically be given to a competing applicant with the same junior-senior average entered into the PFYA, but with a better four-year average. Evaluation of the raw college average is informed by some familiarity, available to law school admission personnel, with the prevailing grading practices at the institution attended. At one college or university, a B+ may be only an average grade, ranking at mid-class, while at another a B+ student may stand in the upper ten per cent. The same disparity may exist between departments in a single college. Even if the same average grade is given, one college or university may be more challenging and demanding than another, so that a student who is only average at a difficult school would have led the class in a smaller pond. Different major fields of study make different demands, and have varying relations to law study. Many colleges offer an option to students to take courses without re-

corded grades, on a pass-fail basis. The PFYA excludes such work from the computation, and a reasonable admissions committee may choose to make a downward adjustment in the prediction for an applicant whose transcript reveals a heavy proportion of such courses.

Admission test scores are also subject to correction and adjustment. The reliability of the LSAT has been fully studied and researched, revealing that the reported score might have been 30 points higher or lower with no change in the applicant's aptitude. Other studies suggest that English majors, with greater fluency, may be slightly overpredicted by their scores. By the same token, an older applicant who has been out of college for several years and removed from the testing process may do less well on the test than on his law school examinations. Familiarity with the design and style of such tests confers an advantage which must be discounted for applicants who are repeating the LSAT or come from an educational system where such standardized tests are more commonly administered.

All such corrections and adjustments are commonplace in the admissions process, taken into account in the judgmental process. Petitioner's reliance on raw numbers to prove a preference ignores them.

d. Rational Prediction Must Take Account of Other Predictive Factors, Unrelated to Test Scores and College Grades.

There is no cause for surprise in the fact that the PFYA does not predict perfectly. The prediction can rise no higher than its source. Rather, it is remarkable that a three-hour multiple-choice test, wholly dissimilar from the typical law school examination, has proved itself in

hundreds of research studies to be roughly as valid as a predictor of law school grades as four years of college, and that it adds significantly to prediction when combined with college grades. Those grades, while measuring general academic motivation and the capacity to master a body of material, have a limited predictive power because legal education is unlike college education. Courses in mathematics or foreign languages offer little guidance for law school performance.

The PFYA does no more than it purports to do: to measure, with reasonable accuracy, some of the mental capacities requisite to the study of law. Its prediction is imperfect, in part because it takes no account of other factors, abilities, and qualities which enter into law school performance. A reasonable selection process looks beyond the PFYA, as petitioner's argument does not, to weigh those non-numerical factors. The typical admissions committee has before it a variety of information about the applicant beyond his college grades and test scores. Recommendations from his college professors and others who can evaluate his potential will offer insights. The applicant ordinarily supplies a brief personal statement, often revealing his motivations for studying law, his experience, attitudes, and expectations. The application materials disclose significant information about his background, including such things as his place of residence, family situation, age, sex, marital status, father's occupation, or his emancipation. His work experience, military service, extracurricular activities, and significant achievements are reported. Other information may be provided by an interview of the applicant, by casual contact, or by his correspondence with the admissions office.

It is commonplace that some law students fail to make full use of their abilities, while others excel with modest

natural talent. Some who were uninterested by college work, or unchallenged by it, concentrate their energies on the study of law, while others find the discipline uncongenial. One student may be driven by a commitment to become a lawyer, while his equally able classmate may plan a career in business. Factors such as these are intangible but nonetheless real, and important determinants of law school success. Their use is illustrated not only by the fact that the Washington law school denied admission to 29 candidates with PFYA's higher than petitioners', and admitted 38 non-minority applicants with lower PFYA's, but also by the facts presented in the *Pre-Law Handbook: Official Law School Guide* (AALS-LSAC, 1973-74). A majority of law schools have included in this publication a chart showing the numbers who applied and the numbers who were accepted in each range of test score and college grades. Perusal of the charts will counter any notion that admission is controlled by numbers alone, and will reveal no fixed score or grade average above which all are admitted and below which all are denied at any schools.

e. Predictions Based on Test Scores and College Grades Must Be Ameliorated for Minority Backgrounds which Restrict Opportunities to Acquire or to Demonstrate Academic Abilities.

It is fashionable to refer to unquantified factors as "subjective", in contrast with "objective" test scores and college grades. The terminology may be taken to imply that numerical predictors are somehow neutral, impartial, and untainted by any tinge of bias or human error. The implication will not survive scrutiny. The use of such objective standards in this case would have admitted one-fifth of all non-minority applicants, but only one of 72

Blacks, Chicanos, American Indians, and Filipino-Americans. The pattern is typical, as this Court took notice in *Griggs* v. *Duke Power Co.*, 401 U.S. 430 (1971), dealing with a like requirement of a passing score on a standardized test or of requisite educational attainment (a high school diploma), which "operate to disqualify Negroes at a substantially higher rate than white applicants." 401 U.S., 426. "This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools. . . ." 401 U.S., 430.

The Court's observations are borne out by repeated studies. For example, the past week's news announced results of research supported by the U.S. Office of Education, examining changes in I.Q. scores over the eight-year period of primary education for 2000 Pittsburgh children, half of whom were black. The scores declined for children, black or white, who attended lower class, predominantly black grammar schools, while scores increased for students, black or white, who attended predominantly white middle class schools.*

The typical minority applicant who applied to law school with petitioner was born in the year when this Court decided *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and grew up in an era of segregated housing. He entered public school the year this Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and was entered into a system of segregated education. He was sixteen and ready for the job market when Congress prohibited discrimination in employment with the Civil Rights Act of 1964. It is in-

* Reported in Time, Feb. 4, 1974, pp. 66-67.

sisted, however, that the law school was forbidden to take account of these cumulative handicaps because it had not previously been adjudicated guilty of any racial discrimination. The argument leads to the remarkable conclusion that the Constitution compels the innocent to become complicit to the wrongful discrimination by enforcing its consequences and excluding the victim because he has been wronged in the past by others. At each succeeding educational level, the victim would be met by further discrimination, produced by the handicaps visited upon him in the level below. No remedial action would be permitted to aid the actual victim, since this view of the law would "freeze the status quo of prior discriminatory . . . practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

The consequences of discrimination are inextricably interwoven with minority status, and their educational impact has not been ignored by this Court, the Congress, or the law schools. The ultimate goal of a society where hard work and ability alone are controlling, and origins, birth, and status are disregarded, can be achieved only when handicaps visited upon origins, birth, and status have first been eliminated. That day has not yet arrived.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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